

37 Am. Jur. 2d Fraud and Deceit § 99

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Fraud and Deceit

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IV. False Representations

C. Matters of Futurity; Promises and Statements of Intention

2. Promises and Statements of Intention

b. Promises Made with Intention Not to Perform

§ 99. Effect of the statute of frauds; parol evidence rule

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There is a conflict of authority on the question of maintaining an action for fraud or deceit predicated upon an oral promise within the statute of frauds. While many cases bear indirectly or argumentatively on the question,¹ a number of cases state or indicate that the mere refusal to perform such oral promise is not of itself a fraud for which an action will lie² since in such a case the promisor has not, in a legal sense, made a contract and hence has the right, both in law and in equity, to refuse to perform.³ It has been stated that an action brought upon such a promise would be considered one brought on an unenforceable contract, rather than a maintainable one in tort for deceit where the damages claimed showed that in its essence the action was attempted to be premised upon breach of the promise falling within the statute.⁴ Also, it may be otherwise stated that where an alleged oral agreement is unenforceable under the statute of frauds, a party can not recover from the other party for fraud on the theory that the oral promise was made without the intention of performing it.⁵

There is, however, authority for the relaxation of the above principles, especially in cases of great hardship,⁶ and some courts, assuming that fraud may be predicated on an oral promise made with the intention at the time not to perform, have held that the fact that the oral promise is unenforceable under the statute of frauds does not preclude the showing of the promise in an action for deceit.⁷ It has been held that the promisor is estopped from asserting the statute of frauds.⁸ Other courts, while recognizing that the mere nonperformance of an oral promise that falls within the statute of frauds is not such a fraud as would warrant the intervention of a court of equity, nevertheless hold that, if one party is induced by another, on the faith of the oral promise, to place himself or herself in a worse position than he or she would have been in had no promise been made, and if

the party making the promise derives a benefit as a result of the promise, "constructive fraud" exists that is subject to a trial court's equity jurisdiction.⁹

Observation:

Promissory fraud is a promise made without any intention of performing it. The fraud exception to the parol evidence rule does not permit parol evidence of such promissory fraud if the evidence in question is offered to show a promise that contradicts an integrated written agreement. Rather, the evidence must tend to establish some independent fact or representation, some fraud in the procurement of the instrument, or some breach of confidence concerning its use and not a promise directly at variance with the promise of the writing.¹⁰

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Footnotes

- 1 Davidson v. Edwards, 168 Ark. 306, 270 S.W. 94 (1925); Little v. Union Oil Co. of Cal., 73 Cal. App. 612, 238 P. 1066 (1st Dist. 1925); Nanos v. Harrison, 97 Conn. 529, 117 A. 803 (1922); Hazleton v. Lewis, 267 Mass. 533, 166 N.E. 876 (1929); Burgdorfer v. Thielemann, 153 Or. 354, 55 P.2d 1122, 104 A.L.R. 1407 (1936).
Under Louisiana law, unfulfilled, future promises, without more, do not constitute fraud, especially where the oral statements contradict the terms of a writing. *Red Roof Inns, Inc. v. Murat Holdings, L.L.C.*, 223 S.W.3d 676 (Tex. App. Dallas 2007).
- 2 Cerny v. Paxton & Gallagher Co., 78 Neb. 134, 110 N.W. 882 (1907) (dictum); Papanikolas v. Sampson, 73 Utah 404, 274 P. 856 (1929).
- 3 Zager v. Brown, 242 Ga. App. 427, 530 S.E.2d 50 (2000); Papanikolas v. Sampson, 73 Utah 404, 274 P. 856 (1929).
- 4 Papanikolas v. Sampson, 73 Utah 404, 274 P. 856 (1929) (conceding that an action in tort for deceit is unaffected by provisions of the statute of frauds, but stating that to save the action from the statute, it must be shown from the pleadings in their essence that the action is truly one in tort).
- 5 Caplan v. Roberts, 506 F.2d 1039 (9th Cir. 1974) (applying California law).
- 6 Daniel v. Daniel, 190 Ky. 210, 226 S.W. 1070 (1921); Kinkaid v. Rossa, 31 S.D. 559, 141 N.W. 969 (1913).
- 7 Burgdorfer v. Thielemann, 153 Or. 354, 55 P.2d 1122, 104 A.L.R. 1407 (1936).
- 8 Stokes v. Bryan, 42 Ala. App. 120, 154 So. 2d 754, 5 A.L.R.3d 164 (1963).
- 9 Farrington v. Allsop, 670 N.E.2d 106 (Ind. Ct. App. 1996).
- 10 Alling v. Universal Manufacturing Corp., 5 Cal. App. 4th 1412, 7 Cal. Rptr. 2d 718 (1st Dist. 1992).

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